No. 80-5887

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

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RICHARD H. WHITE, PETITIONER

v.

NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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This brief is filed in response to the Court's invitation of March 23, 1981.

QUESTION PRESENTED

Whether a motion for attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988, must be filed within the ten day period provided under Fed. R. Civ. P. 59(e) for a motion to alter or amend the judgment.

STATEMENT

1. Petitioner, on behalf of himself and a class of similarly situated individuals, filed an action under 42 U.S.C. 1983 on March 8, 1976, alleging that the respondents, New Hampshire Department of Employment Security (hereinafter "the Department") and its Commissioner, violated the due process clause of the Fourteenth Amendment and Section 303(a)(1) of the Social Security Act, as amended, 42 U.S.C. 503(a)(1), by failing to make timely determinations concerning the eligibility of certain claimants for unemployment compensation. The complaint sought both declaratory and injunctive relief.

The action was certified as a class action and, following trial, the district court entered judgment in favor of petitioner and his class, holding that respondents' administrative procedure violated 42 U.S.C. 503(a)(1).[1/] Respondents appealed. While the appeal was pending, however, the parties entered into settlement negotiations. Respondents sought, and were granted by the court of appeals, a remand to the district court "for the purpose of entertaining a consent decree" (Pet. App. A-2). A consent decree was approved and entered by the district court on January 26, 1979 (ibid.). The decree made no mention of attorney's fees, although the question of fees had been discussed during negotiations, including the possibility that counsel might waive attorney's fees (Pet. 3-4, Pet. App. A-18).

On June 7, 1979, petitioner moved for an award of attorney's fees under 42 U.S.C. 1988.[2/] Respondents filed an objection, described by the court of appeals (Pet. App. A-3) as stating four grounds: (1) petitioner had waived attorney's fees during settlement negotiations on the merits, (2) petitioner had waited

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1/ The court, therefore, did not reach the constitutional claim.

2/ The petition states, however, that petitioner's counsel initiated negotiations concerning a fee award five days after the entry of the consent decree (Pet. 4, note 1).

"too long to request attorney's fees * * *,"[3] (3) an award of fees would penalize the state for its good faith in entering into the consent decree, and (4) petitioner and his class were not "prevailing parties" under 42 U.S.C. 1988. The district court, following a hearing, entered an order on August 30, 1979, granting fees in the amount of $16,644.40, approximately $2,000 less than the amount requested by petitioner (Pet. App. A-18, A-25). On September 13, 1979, respondents filed a motion to vacate the entry of the consent decree on the merits on the basis that "[p]laintiff's Motion for Attorney's Fees which was filed almost six months after the entry of the Consent decree caught [the Department] by surprise, as prior to this time, [the Department] had no notice that attorney's fees would be requested and certainly had no notice at all as to the amount of attorney's fees that would be requested." (Pet. App. A-3). The district court denied, without opinion, the motion to vacate (Pet. App. A-16), and respondents filed timely notices of appeal both from that order and from the order granting fees (Pet. App. A-3 to A-4).

2. The court of appeals, which consolidated respondents' appeals, determined that the motion for attorney's fees was not timely because it was not filed within the ten day period provided under Fed. R. Civ. P. 59(e) for a motion to alter or amend the judgment (Pet. App. A-4). It therefore did not reach respondents' contention that the consent decree should be vacated due to the allegedly unexpected award of fees (ibid.).

The court held, first, that the ten day period for motions governed by Rule 59(e) is jurisdictional, citing Fed. R. Civ. P.

3/ Respondents apparently did not specifically argue that Fed. R. Civ. P. 59(e) governed the time for filing the attorney's fees motion.

6(b),[4] and, thus, that respondents' failure to raise that argument in the district court did not preclude its argument on appeal. Stressing the need for finality of litigation, the court concluded that the opportunity for asserting new claims or reinstating old ones after entry of final judgment must be narrowly circumscribed (Pet. App. A-7 to A-8). The court then addressed and rejected the arguments raised by petitioner in support of his contention that a motion for an award of fees under 42 U.S.C. 1988 is not governed by the ten day limit on motions to amend or alter the judgment under Rule 59(e).

Petitioner argued that because 42 U.S.C. 1988 provides that attorney's fees may be awarded "as part of the costs" and costs are governed by Fed. R. Civ. P. 54 and 58, which contain no time limits, there is no time limit for filing a motion seeking fees. This argument was adopted by the Fifth Circuit in Knighton v. Watkins, 616 F.2d 795, 797-798 (1980), in an opinion handed down subsequent to oral argument in the court of appeals in this case. The First Circuit rejected the analysis of the court in Knighton, relying instead upon the decision of the district court in Hirschkop v. Snead, 475 F. Supp. 59 (E.D. Va. 1979). The court held that, regardless of Congress' reference to fees under Section 1988 as costs, attorney's fees, unlike most of the items enumerated in 28 U.S.C. 1920 as costs to be awarded "as of course" under Fed. R. Civ. P. 54(d), are not capable of routine calculation and are likely to engender controversy which may lead to appeal. Thus, it reasoned that despite the explicit language

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4/ Fed. R. Civ. P. 6(b) provides, in pertinent part, that a district court:

> May not extend the time for taking any action under Rules 50(b), 52(b), 59(b), (d), and (e), and 60(b), except to the extent and under the conditions stated in them.

Rule 59(e) provides no conditions under which the time for filing a motion could be enlarged.

of the statute, attorney's fees under Section 1988 cannot be treated like costs for the purpose of determining when they must be sought. In so ruling, the court recognized that this Court referred in Hutto v. Finney, 437 U.S. 678 (1978), to attorney's fees awarded under Section 1988 as costs, but concluded that those references were made in a context so distinct as not to be dispositive of the issue presented here.5/

The court also rejected petitioner's argument that the claim for attorney's fees is a collateral and independent claim that is not subject to time limits related to the original judgment on the merits. The court concluded that an attorney's fee claim can only be considered collateral or independent where an attorney is seeking to assert a right of his own rather than that of his client or, as in this Court's decision in Sprague v. Ticonic National Bank, 307 U.S. 161 (1939), where there is a common fund created by the original judgment that is used to pay the fees, instead of an additional award over and above the judgment (Pet. App. A-12). The court also relied upon the language of Section 1988, which provides that the court may allow attorney's fees "[i]n any action or proceeding" to enforce certain civil rights statutes, as negating the theory that the fees claim is collateral and independent (Pet. App. A-13).

DISCUSSION

The decision of the court below is in conflict with the decsions of the Fifth Circuit in Knighton v. Watkins, 616 F.2d 795 (1980), the Seventh Circuit in Bond v. Stanton, 630 F.2d 1231 (1980), and the Sixth Circuit in Jonnson v. Snyder, 639 F.2d 316 (1981), which have rejected the contention that a motion for

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5/ The court also noted this Court's decision in Roadway Express, Inc. v. Piper, No. 79-701 (June 23, 1980), that attorney's fees are not a part of the costs that may be taxed under 28 U.S.C. 1927 against an attorney who unreasonably and vexatiously increases the costs of litigation.

attorney's fees under 42 U.S.C. 1988 must be made within the ten day period provided under Rule 59(e) for a motion to alter or amend the judgment.[6] The Tenth Circuit, on the other hand, has indicated its agreement with holding of the court below, Gurule v. Wilson, 635 F.2d 782, 787-788 (1980).[7]

The question presented is of considerable importance to civil rights litigants and is one that should be resolved by this Court in order to insure that a uniform rule is applied throughout the federal court system.

1. In cases outside the context of the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988, several courts have held that the question of attorney's fees should be resolved either prior to or at the time of entry of the judgment on the merits or, at the latest, within the ten days provided by Rule 59(e), except in certain specifically defined circumstances.[8] Fase v. Seafarers Welfare and Pension Plan, 432 F. Supp. 1037 (E.D. N.Y. 1978), aff'd on other grounds, 589 F.2d 112 (2d Cir. 1978) (timeliness issue discussed at 114-115, note 3); Stacy v. Williams, 446 F.2d 1366 (5th Cir. 1971); DuBuit v. Harwell Enterprises, Inc., 540 F.2d 690 (4th Cir. 1976). An award of costs in a district court, on the other hand, is made

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6/ The decision of the Fourth Circuit in Fox v. Parker, 626 F.2d 351 (1980), while not addressing the issue directly, suggests, at page 353, note 2, that the court would follow the majority position rather than that of the court below.

7/ The issue in Gurule was whether a timely appeal from the award of attorney's fees under Section 1988, rather than from the earlier judgment on the merits, was sufficient to bring the merits to the court of appeals. The court concluded it was, on the theory that the judgment on the merits was interlocutory, because no full relief had been awarded until the district court passed on the request for attorney's fees. Although the court in Gurule noted that plaintiffs there had included a demand for attorney's fees in their complaint (petitioners here did not), it also stated that its decision "accords with" the decision in the instant case (635 F.2d at 788).

8/ The major exceptional circumstance arises when the fee is to be paid out of a fund created by the litigation, Sprague v. Ticonic National Bank, 307 U.S. 161 (1939). See Pet. App. A-5 note 4; A-12.

after judgment, Fed. R. Civ. P. 58, and is subject to no time limitations, Fed. R. Civ. P. 54(d). The question in this case is whether, by specifying that attorney's fees under Section 1988 are to be awarded as part of the costs, Congress intended such an award to be treated as costs for purposes of determining when they must be sought.

The courts of appeals have split on that question. The court below concluded that simply because Congress referred to them as costs, it did not intend that they be treated as costs for all purposes nor to abrogate the general rule that fees must be sought within the time provided by Rule 59(e). It relied upon the language in Section 1988 that fees may be sought "in any action or proceeding" as evidence that they should be settled by the original judgment or by motion to alter or amend it. The Fifth Circuit, on the other hand, instead emphasized the language in Section 1988 referring to fees as costs. See Knighton v. Watkins, supra, 616 F.2d at 797. The court in Knighton also noted that under Section 1988 fees may be awarded only to prevailing parties, and reasoned that entitlement to Section 1988 fees first arises after the conclusion of the litigation on the merits. Since the prevailing party seeks only "what is due because of the judgment," he is not attempting to alter or amend the judgment (ibid.). The court accordingly concluded that a motion for fees under Section 1988 is not governed by the time limitation of Rule 59(e).

2. Our review of the legislative history of Section 1988 does not reveal any discussion of the question of the timing of the request for fees or any explanation of why the statute provides that the fees are to be awarded "as part of the costs." This is not surprising, however, in light of the fact that Congress was aware of at least sixteen other statutory provisions in existence at the time of passage of Section 1988

that contained the identical language.[9] Congress was also aware that there were approximately 90 federal statutory provisions providing in similar terms for an award of attorney's fees.[10] The fee provisions are phrased in a wide variety of ways; some state that costs and expenses including attorney's fees are to be allowed[11] while some allow costs and or together with such fees,[12] and others simply state that reasonable attorney's fees are to be allowed[13] or specify a fund from which such fees are to be paid.[14]

We do not believe that the particular wording of the fee provision is of substantial assistance in determining the timeliness of a motion for fees. In Roadway Express, Inc., v. Piper, No. 79-701 (June 23, 1980), this Court rejected the

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9/ These sixteen are listed as Appendix E to the legislative history of Section 1988 prepared in 1976 by the Subcommittee on Constitutional Rights of the Senate Judiciary Committee (Civil Rights Attorney's Fees Awards Act of 1976 (Public Law 94-559, S.2278) Source Book: Legislative History, Texts, And Other Documents, 94th Cong., 2d Sess). They are 7 U.S.C. 210(f) (Packers and Stockyards Act); 7 U.S.C. 499g(b), 499g(c) (Perishable Agricultural Commodities Act); 7 U.S.C. 2305(a), 2305(c) (Agricultural Unfair Trade Practices Act); 17 U.S.C. 505 (Copyright Act); 20 U.S.C. 1617 (Education Amendments of 1972); 42 U.S.C. 19731(e) (Voting Rights Act Amendments of 1975); 42 U.S.C. 2000a-3(b) (Title II, Civil Rights Act of 1964); 42 U.S.C. 20003-5(k) (Title VII, Civil Rights Act of 1964); 45 U.S.C. 153(p) (Railway Labor Act); 47 U.S.C. 206, 47 U.S.C. 407 (Communications Act of 1934); 49 U.S.C. 8, 49 U.S.C. 16(2), 49 U.S.C. 908(b), 908(e) (Interstate Commerce Act).

10/ These were also contained in legislative history referred to in note 9 supra.

11/ See, e.g., 15 U.S.C. 15c(a)(2) (Antitrust Parens Patriae Act); 15 U.S.C. 2059(e)(4) (Consumer Product Safety Act); 30 U.S.C. 938(c) (Coal Mine Safety Act). Cf. 5 U.S.C. 552(a)(4)(e) (Freedom of Information Act; "reasonable attorney fees and other litigation costs").

12/ See, e.g., 15 U.S.C. 1691e(d) (Equal Credit Opportunity Act); 15 U.S.C. 1918(a) (Motor Vehicle Information and Cost Savings Act); 42 U.S.C. 3612(c) (Fair Housing Act of 1968).

13/ See e.g., 7 U.S.C. 2565 (Plant Variety Act); 15 U.S.C. 117 (Trademark Act); 35 U.S.C. 285 (Patent Infringement Act).

14/ See, e.g., 22 U.S.C. 277d-21 (Mexican-American Chamizal Convention Act of 1964); 22 U.S.C. 1623(f) (International Claims Settlement Act); 29 U.S.C. 501(b) (Labor-Management Reporting and Disclosure Act of 1959).

"superficially appealing argument" that civil rights statutes allowing the award of attorney's fees "as part of the costs" of litigation required that such fees be treated as costs under 28 U.S.C. 1927 (slip op. 5). Instead, the Court considered the purposes of the statutory provisions involved, and the practical results of accepting the purely semantic argument (slip op. 8-10). A similar approach is appropriate here.15/

3. The general rule that motions for the award of attorney's fees are governed by the time limits of Rule 59(e) is justified by the fact that, as the court below recognized (Pet. App. A-13, A-14), there are sound practical reasons for requiring such motions to be submitted promptly. The party against whom fees are to be awarded should know the outside limit of his liability within a reasonable time after judgment is entered against him.16/ Moreover, since disagreements over fee awards often lead to appeals, considerations of judicial economy suggest that an appeal from an order granting or denying an award of fees should be considered along with any appeal on the merits. These factors counsel some time limitation for a fees motion; neither party points to any limitation other than that provided by Rule 59(e), and we are aware of none.17/

Petitioner has suggested no persuasive reason why this general principle should not be applied to cases that arise under statutes providing for the recovery of attorney's fees as part of

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15/ This Court's language in Hutto v. Finney, supra, which merely reflected the wording of the fee provision in Section 1988, is not inconsistent with this approach; that case is of no significant assistance in analyzing the issue presented by the instant petition.

16/ It would, in any event, be open to the party against whom a fee award is sought to raise a defense of laches.

17/ It may well be that an amendment of the Federal Rules of Civil Procedure to provide expressly for such a time limitation would be appropriate. Any such amendment would, of course, operate prospectively, and thus provide affected parties with ample notice of the applicable time limits.

costs. The time the prevailing party needs in order to calculate its fee should not be significantly greater in those situations,[18] nor should settlements be discouraged. On the contrary, when there is an express statutory provision for the recovery of attorney's fees, the negotiating parties will ordinarily be particularly aware that such fees are an element that must be negotiated before the matter can be finally resolved. As the court below observed (Pet. App. A-15): "Failure to confront the fees issue merely muddies the waters, as the present case well demonstrates. * * * Where Congress has spoken on the subject of fees, there can be no virtue in pretending the issue does not exist."

4. We do not, however, read the court of appeals opinion as requiring that the amount of the fee must be determined, or even considered, in the course of settlement negotiations on the merits.[19] We agree with petitioner (Pet. 18-23) that such a requirement raises troublesome ethical problems. Since the fee award is often the only remuneration counsel for a class of plaintiffs in a civil rights action can expect to receive, and in any event is likely to have at least some effect on counsel's remuneration, the attorney may have an interest adverse to his client if the question of the size of his fees becomes part of the settlement negotiations, see Prandini v. National Tea Co., 557 F.2d 1015, 1020-1021 (3d Cir. 1977); Mendoza v. United

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18/ If the 10 day limitation is unreasonably short in a particular situation, the district court can provide for more time by entering a judgment that expressly reserves the matter of fees. See Pet. App. A-14 to A-15.

19/ In cases in which the parties cannot agree on a settlement, it will ordinarily be necessary to await the judgment to determine which side is entitled to attorney's fees. In that situation, it is clearly impractical to require that the size of the fee must be determined at the time of the judgment.

States, 623 F.2d 1338, 1352-1353 (9th Cir. 1980).20/ Thus, detailed fee discussions should ordinarily be conducted after agreement on the merits has been reached.

5. We are not particularly qualified to discuss the various purely practical problems that confront private attorneys in attempting to negotiate settlement agreements in this context, so there may well be other considerations that should be evaluated in balancing the competing interests involved. At all events, there should be a uniform rule among the circuits governing the timeliness of motions for fees. This Court should therefore enunciate that rule after full briefing and argument of the question presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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20/ For the same reason, it is undesirable to encourage defendants in class suits to make an offer in settlement of a specific sum, to be divided among the class members and counsel as they see fit. It should be clear that plaintiffs' counsel can legitimately refuse such offers.